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No. 82-1082

In The

Supreme Court of the United States

October Term, 1982

THOMAS N. RUPE,

Petitioner,

vs.

RUTH BLAKE and LOUIS DEKMAR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF WYOMING

BRIEF OF RESPONDENT DEKMAR IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent, Louis Dekmar, asserts the following issues are presented by the Petition for Writ of Certiorari to the Supreme Court of Wyoming:

I. Does the state court's action of directing a verdict on a Federal statutory claim at the close of all evidence present a substantial Federal issue?

II. Did the Wyoming Supreme Court's application of qualified and absolute immunity determine any issue involving a Federal question?

III. Did the Wyoming Supreme Court's determination that defendant Dekmar was entitled to qualified immunity violate the plaintiff's constitutional right of due process?

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STATEMENT OF THE CASE

The Petitioner's Statement of the Case bears little resemblance to the evidence presented at trial. The statement is argumentative, self-serving and unsubstantiated as evidenced by the absence of any reference to the record on appeal. Further, the Petitioner's Statement of the Case contains no reference to when the Federal ques-

tions sought to be reviewed were raised and how they were passed upon by the Wyoming Supreme Court, in express violation of U. S. S. C. R., Rule 21(h).

Respondent Blake has submitted an excellent recitation of the facts with references to the record in her Opposition Brief. Respondent Dekmar is in concurrence with the facts set forth therein. In addition, the opinion of the Wyoming Supreme Court sets forth an outline of the relevant facts. (Petitioner's Appendix, pp. 6-9).

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari to the Supreme Court of Wyoming fails to set forth a substantial Federal issue determined by the Wyoming Supreme Court concerning a right claimed under the Constitution or statute of the United States, as required for United States Supreme Court jurisdiction pursuant to 28 U. S. C. § 1257(3). In addition, the Petition fails to establish any special or important reason for this Court to grant certiorari.

ARGUMENT

I. Does the State Court's action of directing a verdict on a Federal Statutory Claim at the close of all evidence present a substantial federal issue?

The Petitioner's threshold question in this matter is whether or not the plaintiff's claims fall within the pro-

tection of 42 U. S. C. § 1983. The Petitioner asserts, without reference to the record, that the trial court and the Wyoming Supreme Court held that 42 U. S. C. § 1983 does not protect a juror's First and Fourteenth Amendment rights of free speech. However, no such determination was made by the trial court or the Wyoming Supreme Court.

The trial court did not dismiss the civil rights count based upon the sufficiency of the allegations in the plaintiff's Complaint. Nor did the trial court rule the Petitioner could not pursue the civil rights action. Indeed, the defendants moved to dismiss the civil rights count under W. R. C. P. Rule 12(b)(6). (R. Vol. I, p. 24). The defendants' motion was denied by the trial court. (R. Vol. I, p. 58).

Instead, the trial court allowed the plaintiff to submit evidence at trial to substantiate the alleged civil rights violation. At the close of the plaintiff's case, the defendants moved for a directed verdict on the civil rights claim. (R. Vol. III(3), p. 522). The trial court took the motion under advisement. (R. Vol. III(3), p. 539). At the close of all evidence, the trial court granted the defendants' motion for directed verdict on the civil rights count. (R. Vol. III(4), p. 693).

In granting the defendants' motion for a directed verdict, the trial court did not rule that 42 U. S. C. § 1983 did not provide a remedy for a violation of a juror's right of free speech. The trial court simply ruled the plaintiff failed to present sufficient evidence to establish the claim or present a question for the jury to determine. Since the plaintiff submitted insufficient evidence, the court directed

a verdict in favor of the defendants. The trial Court's ruling was affirmed on appeal.

It is this Respondent's position that the trial court's direction of a verdict in favor of the defendants fails to present this Court with a substantial Federal question. Although Count I is a claim under a Federal statute, both state and Federal courts have concurrent jurisdiction to hear such claims. *Long v. District of Columbia,* 469 F. 2d 927 (D. C. Cir. 1972). The plaintiff elected to pursue his action in the Wyoming state court system.

The determination as to whether or not the plaintiff presented sufficient evidence in a state court proceeding to justify submitting a case or an issue to a jury, is a question of state law. This is true whether the plaintiff is pursuing a claim under state tort law or under a Federal statute.

28 U. S. C. § 1257(3) provides that the United States Supreme Court has jurisdiction to review by way of a Writ of Certiorari final judgments rendered by state courts where any right is claimed under the Constitution or statutes of the United States. However, the Supreme Court will not review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide Federal questions. *Herb v. Pitcairn,* 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1945).

The Petitioner requests this Court to assert its jurisdiction to consider the present case due to the fact it deals with a right under a Federal statute. However, that was not the issue determined below. The trial court did not determine the plaintiff could not assert the rights claimed under the civil rights statute. Instead, the trial court de-

termined the plaintiff failed to present sufficient evidence to sustain a claim or to even submit the theory to a jury. The Court did not decide a Federal question, i. e., whether a Federal claim existed. The trial court only determined the evidence presented at trial did not sustain the claim, a state question.

Since there are independent and adequate grounds to ssutain the trial court's directing a verdict on Count I, although the Court's decision affects a Federal claim, this Court is not faced with a substantial Federal question. Therefore, certiorari should be denied.

II. Did the Wyoming Supreme Court's application of qualified and absolute immunity determine any issue involving a federal question?

The Petitioner also seeks review of the Wyoming Supreme Court's ruling that defendant, Ruth Blake, was entitled to prosecutorial immunity and that the defendant, Louis Dekmar, was entitled to qualified "good faith" immunity, and the nature and extent of such immunities.

However, no Federal question is presented to allow this Court jurisdiction under 28 U. S. C. § 1257(3). A careful review of the Wyoming Supreme Court's opinion reveals the Court ruled as to the nature and extent of prosecutorial and qualified immunity only with reference to the Wyoming State tort claims. The Wyoming Supreme Court left undisturbed the trial court's dismissal of the civil rights claim at the close of the evidence. The court did not consider the application of the defenses to the federal claim. Therefore, the Wyoming Supreme Court did not address any Federal claim or issue, or any possible defense to such claims.

Since the only issue determined by the Wyoming Supreme Court was the issue of the application of prosecutorial and executive qualified immunities to the state tort actions, no Federal issue or question was determined by the Wyoming Supreme Court. Therefore, review by the United States Supreme Court would be inappropriate, and Petitioner's Writ of Certiorari should be denied.

III. Did the Wyoming Supreme Court's determination that defendant, Dekmar, was entitled to qualified immunity violate the plaintiff's constitutional right of due process?

In his final attempt to create a Federal issue, the Petitioner claims he was denied his Federal constitutional rights of due process when the Wyoming Supreme Court ruled as a matter of law that defendant, Louis Dekmar, was entitled to "good faith" qualified immunity.

The Petitioner first claims he was denied due process as he was not given notice of the defendant's affirmative defense of immunity. This assertion belies the record below. The defendants' Answer to the Complaint contained a number of affirmative defenses specifically relating to the immunity defenses. (R. Vol. I, pp. 66-67). In addition, prior to trial, the defendants tendered two instructions, Nos. 21 and 32, which expressly set forth the qualified "good faith" immunity. (R. Vol. I, pp. 236, 247). For the Petitioner to state now that he was unaware of the defendants' defenses, contradicts the record on appeal.

In any case, the sufficiency of pleading affirmative defenses in cases before the Wyoming state court system is controlled by Rule 8(c) of the Wyoming Rules of Civil Procedure. The Wyoming Supreme Court implicitly ruled

the defense was properly raised under the Wyoming rules. This was an issue of state law and no Federal issue was decided or involved.

The Petitioner also argues that the Wyoming Supreme Court's determination that the record established defendant, Louis Dekmar, was entitled to the defense of qualified immunity as a matter of law, violated his right to due process. Petitioner asserts the Court shifted the burden of proof of establishing "good faith" from the defendant to the plaintiff. This misinterprets the Court's ruling. The Wyoming Supreme Court did not rule the plaintiff failed to establish bad faith or that the plaintiff would be required to establish bad faith. The Court simply determined from its extensive review of the record the defense of "good faith" on the part of defendant, Dekmar, was established as a matter of law.

Again, the Wyoming Supreme Court passed only upon matters of state law. No Federal question was at issue and no Federal question was determined by the Wyoming Supreme Court. Therefore, review by Writ of Certiorari would be inappropriate.

CONCLUSION

Respondent, Louis Dekmar, prays this Court will deny the Petition for Writ of Certiorari to the Supreme Court of Wyoming. The decision of the Wyoming Supreme Court did not pass on a substantial Federal issue, nor does the Petition establish any special or important

reason this Court should review the decision of the Wyoming Supreme Court.

Respectfully submitted,

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